United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1658

IN THE

United States Court of Appeals

SECOND CIRCUIT

LAWRENCE RALPH and DIVERSE OTHERS,
Plaintiffs-Appellants,

vs.

THE BETHLEHEM STEEL CORPORATION and
THE UNITED STEELWORKERS OF AMERICA,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANT-APPELLEE, THE BETHLEHEM STEEL CORPORATION

HODGSON, RUSS, ANDREWS,
WOODS & GOODYEAR,
Attorneys for Defendant-Appellee,
The Bethlehem Steel Corporation,
1800 One M & T Plaza,
Buffalo, New York 14203,
Tel.: (716) 856-4000.

JOHN E. DICKINSON,
DAVID E. HALL,
Of Counsel.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON — SENIOR REPRESENTATIVE
HAROLD L. BERKOBEN, REPRESENTATIVE
7351 BAKELINE DR., PITTSBURGH, PA. 15227
412 881-7443

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

IN THE

United States Court of Appeals

SECOND CIRCUIT

No. 74-1658

LAWRENCE RALPH and DIVERSE OTHERS,
Plaintiffs-Appellants,

vs.

THE BETHLEHEM STEEL CORPORATION and
THE UNITED STEELWORKERS OF AMERICA,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANT-APPELLEE, THE BETHLEHEM STEEL CORPORATION

Preliminary Statement

This is an appeal from a decision and order of the United States District Court for the Western District of New York, Curtin, J., entering judgment in behalf of both defendants dismissing plaintiffs' complaint.

Issues Presented for Review

1. Does a triable issue of fact exist with regard to the question of fair representation of the plaintiffs by the defendant, United Steelworkers of America?

2. Did the plaintiffs abandon the grievance procedure, thereby preventing the Union from performing its duty of representation?

Statement of the Case

This action was commenced in the United States District Court, Western District of New York by plaintiffs, employees of Bethlehem Steel Corporation ("Bethlehem") under Section 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185(a). Plaintiffs allege that Bethlehem has violated the collective bargaining agreement ("Agreement") between Bethlehem and the defendant United Steelworkers of America ("Steelworkers") and that Steelworkers, collective bargaining representative of plaintiffs, has breached its duty of fair representation owed plaintiffs in the processing of certain grievances initially filed by Steelworkers to remedy Bethlehem's alleged breaches of the Agreement. Plaintiffs seek relief in the form of money damages.

Following the conclusion of extensive discovery by plaintiffs, Bethlehem and Steelworkers moved for summary judgment against plaintiffs pursuant to Rule 56, Federal Rules of Civil Procedure. In a decision and order dated January 3, 1974, the District Court, Curtin, J., granted judgment in behalf of both defendants, dismissing plaintiffs' complaint without costs. In its decision (A. 5) the District Court found that plaintiffs had failed to show any material issue of fact supporting the plaintiffs' claim that the Union failed in its duty of fair representation and therefore held that the plaintiffs' cause of action against Steelworkers must be dismissed. Having found no breach of duty by Steelworkers the court proceeded to dismiss the complaint against Bethlehem and directed that any claim for retroactive pay which plaintiffs have should be processed in the grievance procedure (A. 21).

Plaintiffs now appeal from this order dismissing their complaint.

Statement of Facts

This litigation arose from the establishment of incentive wage plans by Bethlehem for certain employees at its Lackawanna, New York plant. On or about May 25, 1956 Bethlehem and Steelworkers entered into a supplemental agreement called the "1956 Agreement" (A. 233) which provided in substance that Bethlehem would convert existing incentive plans with the objective of expressing all such plans in terms of Standard Hourly Wage Rates. The parties included in the 1956 Agreement the provision that new incentive plans established thereunder would "meet the requirement that, over a past representative test period, the average hourly earnings of all the employees assigned to a job under such new plan would not have been less under such new plan than the average hourly earnings received by all the employees assigned to that job during such period under the incentive plan which it replaced."[1] (§ 5(b), 1956 Agreement, A. 235).

In cases where an incentive plan established under the 1956 Agreement produced less average hourly earnings for a job in the "test period" than were produced for a job during the same test period using the "old" plan, the difference was made up by an hourly add-on called "incentive adjustment" or "IA" (Williamson Aff. A. 174-176), which was thereafter paid each employee in addition to his regular hourly earnings. The "IA" constituted a guaranteed hourly payment which the employee received irrespective of his incentive performance.

[1] It should be noted that the purpose of the 1956 Agreement was to convert the computation of incentive wages from a tonnage basis to a standard hourly wage rate. It was not intended to grant any increase in wages *per se* to the employees. Wage increases were to be negotiated in the collective bargaining process as increments in the standard hourly wage rate.

There are two types of incentive plans, "direct" and "indirect". The "direct plans" deal with the compensation of production employees whose output is susceptible to direct measurement; conversely "indirect plans" deal with compensation of employees whose contributions are not so measured (Affidavit of Evenden, A. 136-137). Plaintiffs, electrical and mechanical maintenance employees in Bethlehem's Lackawanna strip mill, are "indirect" employees.

Implementation of the 1956 Agreement

In 1959 and 1960, pursuant to the 1956 Agreement, Bethlehem established several direct incentive plans to measure the compensation of production employees in various units of the strip mill at Lackawanna.[2] Later in 1960, pursuant to the same 1956 Agreement, Bethlehem established two similar incentive plans for employees working in electrical and mechanical maintenance jobs in the strip mill (Williamson Aff. Exs. 1 & 2, A. 188-205). Under these indirect plans, the employees' compensation is determined by a complex formula based on the weighted performances of the aforementioned direct production units in the strip mill which were serviced by the electrical and mechanical maintenance employees (A. 171-178, 195, 205).

More specifically, the indirect employees' incentive earnings depend on the "percent performance" of the direct production units—a means of measuring a direct unit's contribution to the indirect plan. Under this system, common to most of Bethlehem's incentive plans, an employee

[2] The conversion pursuant to the 1956 Agreement involved complex and intensive time study testing of each function in the steel making process and applying to each task a standard of time which could be equated into a percentage of performance for incentive purposes. The process of conversion was so complex and lengthy that it was implemented at the rate of about one unit per month and since there were hundreds of units to be evaluated the Company was still engaged in converting old plans late into the 1960's (Williamson Aff., A. 210-211).

begins to earn incentive pay above his standard hourly wage rate (SHWR) at the point that his unit's output exceeds 74% of its maximum output under optimum conditions. This measurement uses "standard minutes" assigned to various tasks (A. 171-173). The percentage which represents the relationship between actual clock minutes and "standard minutes" is called "percent performance". The percent performance of each contributing unit is then weighted to reflect the role of the indirect employees in that unit's function and an average figure is obtained (A. 178-179). Indirect employees then are paid incentive earnings equal to 67% of this weighted average of the direct units' percent performance multiplied by their respective SHWR (Incentive Plans, A. 191, 199).

The Procedure for Grievance of the Incentive Plans

As each of these incentive plans was established by Bethlehem, the Union filed various grievances under the exclusive procedure provided in Article XI of the Collective Bargaining Agreement, alleging that in one respect or another the plan did not conform to the requirements of the 1956 Agreement.

Some of the grievances involving incentive plans were resolved through grievance procedure or in arbitration; others were resolved by the parties short of arbitration by a Joint Incentive Committee, a specialized body established by the parties in the 1956 Agreement (A. 235). This Committee consisted of representatives of the Union and the Company having special competence in the structuring of incentive systems, who were vested with responsibility for resolving complex technical issues arising under the incentive plans. This became known as the "4½ step" in the grievance procedure, intended to resolve disputes which were headed for arbitration (A. 221-222).

In the course of the processing of the grievances filed by some of the direct incentive units in the strip mill, adjustments were reached which resulted in revision of the underlying incentive plan and pay adjustments to the direct employees involved in that unit. In some cases the resolution of the grievance gave rise to retroactive payments which were made to the direct employees involved.

As the standards of each direct plan were adjusted in the grievance procedure these adjustments were immediately passed along to and incorporated in the computation of plaintiffs' incentive earnings[3] (Schedule of Changes in Incentive Adjustment, attached to Plaintiffs' Answers to Interrogatories, A. 60-65). However no retroactive payments were delivered to the indirect employees until all of the direct grievances had been resolved. Since the amount of retroactive pay would depend upon a "weighting" of the direct plan adjustments it was necessary to defer that computation until all of the contributing plans had been grieved (A. 178).

From a reading of the brief of Appellants' counsel the Court could get the impression that each change in the standards of a direct plan triggers an automatic increase in the incentive payments to the indirect workers. Although this misconception as to the operation of the incentive

[3] Beginning in May 1961 the plaintiffs' indirect plans were adjusted to reflect the changes in the standards made in the Hot Mill Proper and the 54" Tandem Mill direct plans and in like manner adjustments were made on June 10, 1962 to reflect changes in the standards in the Annealing and in the #2, 3 and 5 Skin Mills (A. 142, 144).

Although other direct plans were still being tested in the grievance procedure and were not finally resolved until 1966, the foregoing four plans are the only direct plans on which revisions were made pursuant to the 1956 Agreement, having any bearing on plaintiffs' incentive earnings (Williamson Aff. A. 179-182). What the plaintiffs are claiming in this lawsuit is the alleged loss of retroactive incentive payments for a period beginning April 17, 1960 when the subject plans were first instituted and ending June 10, 1962, the date on which the final adjustment to a contributing direct plan was completed (A. 186).

plans is not material to the summary judgment motion, it seems appropriate that it be corrected so that the Court may not be misled. In the affidavit of Rae Williamson, one of Bethlehem's industrial engineers responsible for structuring the incentive plans, we have set forth at some length the manner of operation of the incentive plans in question and more particularly the impact (if any) of a change in standards of a direct plan upon the indirect plans (A. 174-183). He stresses that if the incentive standards of a direct plan are made more favorable they do not produce a proportionate increase in earnings of indirect workers and in many cases no increases at all (A. 176-178, 179-182).[4]

---

[4] Among the vagaries producing this result is the fact that in the computation of indirect workers' incentive earnings the direct workers are assumed to have performed at 100%. The indirect worker is not penalized for those turns in which the percent performance of the direct unit falls below 100%. He is credited however with the combined percent performance of the direct units which are in excess of 100%. Therefore when adjustments in standards of a direct plan result in increased performances which continue to remain below 100%, such adjustments increase the earnings of the direct workers but have no effect on the incentive earnings of the indirect workers (A. 177-178). One of the reasons why some of the strip mill direct plans were adjusted during the early 1960's is a fact that they were performing below 100% on a substantial proportion of their turns (A. 178).

A more dramatic indication of the lack of impact of direct plans changes upon the earnings of indirect employees, may be seen in the Schedule of Changes in the Incentive Adjustments, attached to Bethlehem's Answers to Interrogatories (A. 64-65). In his analysis of this document (A. 175-176) Williamson pointed out that as the plaintiffs' incentive earnings increased following adjustments in the direct plans, the I.A. went down the same amount. Since the I.A. is simply an "add on" to bring the incentive earnings during the test period up to the level of the old plan earnings, it follows that as the standards of the new plan produce increased performance, the I.A. is reduced.

Referring to the Schedule (A. 206-207), the millwright received an increase in incentive earnings of 6 mills per hour (tested against the test period) as the cumulative result of the adjustments granted to the Hot Mill Proper and Tandem Mill workers on May 7, 1961. However, his I.A. of 17.7¢ was reduced in like amount to 17.1¢, so that the only effect of the adjustment in the direct plans to the millwright was to reduce the I.A. by the amount of the incentive increase (A. 180-181).

In like manner the cumulative result of the adjustment in the Annealing and the #2, 3 & 5 Skin Mills (on June 10, 1962), was an incentive increase of 11 mills per hour to the millwright, but the I.A. was reduced from 17.6¢ to 16.5¢. Assuming that production during the period of retroactive pay was similar to that during the test period the adjustment in the direct plans would produce no increase in hourly earnings to the millwright (A. 180-181).

The point is that the incentive changes involved in this case were so insubstantial that they were more than offset by the I.A. The only time that the change in standards of the direct units can have any impact on indirect workers is the situation in which the incentive changes are substantially greater than the existing I.A. (A. 180-181).

History of Plaintiffs' Grievances

As had been the case with the "direct plans" in the strip mill, following the establishment of the indirect plans for the electrical and mechanical maintenance employees, Steelworkers filed two separate grievances protesting certain aspects of the two plans (Grievances B-3139 and B-3141, A. 145-146, 151-152). Several claims were raised in the two similar grievances, which were processed by Steelworkers through the grievance procedure to arbitration hearings held in 1962. At that point the arbitrator remanded the cases to a lower step pending resolution of the direct unit grievances (Trost Aff., A. 270). During the course of that arbitration, and subsequent grievance processing at lower stages on remand, the parties resolved the Steelworkers' various claims, but in 1964 the two grievances (by this time consolidated) again reached the arbitration level. A hearing was held and in his award (No. 1138, A. 374-376) the impartial arbitrator dismissed the grievances, holding that the claims raised by Steelworkers involved no claim of contractual violation on which he might rule. He pointed out that the Company and Union had already stipulated that, after conclusion of direct plan grievances, changes in direct plans would be applied to the earnings of indirect workers and if any retroactive pay were due they would be paid. Since Company and Union had agreed he thus held that there was no arbitrable issue for him to decide (A. 376).

Subsequently, in 1966, when it appeared that all direct plan grievances of any relevance to plaintiffs had been resolved and that the only adjustments were those in 1961 and 1962, Bethlehem undertook to compute what retroactive payments, if any, were due the indirect employees by reason of the direct plan adjustments (Williamson Aff., A. 184-186).

However, by this time it was discovered that certain production records of the direct units which had been settled back in 1961 and 1962 were inadvertently lost. Under the circumstances, Bethlehem undertook by an alternate method to arrive at what payments, if any, were due the indirect employees (Williamson Aff., A. 184). In May 1966, based upon this computation, a schedule of payments by position was presented to the Union. On May 31, 1966, the proposed payments were presented to the indirect employees assembled at the Union meeting hall. The indirect employees voted to reject the tender and authorized their independent counsel to institute this action (Plaintiffs' Answers to Interrogatories, A. 97). No grievance was ever filed relating to the method of computation used by Bethlehem or questioning the amount tendered (A. 92, 106). Instead, within a matter of a few days the plaintiffs initiated this lawsuit.

Summary of Argument

It is Bethlehem's position that the District Court properly granted summary judgment in favor of both defendants because there is no material issue of fact as to the Union's breach of its duty of fair representation. On the contrary, the record shows that the Union established the plaintiffs' entitlement to any retroactive adjustments that might be properly payable and it was the plaintiffs who abandoned the grievance procedure and prevented the Union from pursuing the orderly resolution of the issue by rejecting the Company's computation of the retroactive payment due and starting this lawsuit.

POINT I

There is no material issue of fact as to the alleged failure of proper representation by the Union.

It is well settled law that once a grievance has been decided by an arbitrator pursuant to an exclusive procedure in a collective bargaining agreement, the arbiter's award is final and binding on the employees involved and is not thereafter open to attack in the courts, absent a breach of the duty of fair representation by the union in processing the employee's grievances. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1963); *Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Alfieri v. General Motors Corp.*, 367 F. Supp. 1393 (W.D.N.Y.), aff'd *per curiam*, 489 F2d 731 (2d Cir. 1973). The same rule of law is uniformly enunciated in cases where an employer and union representative resolve a grievance short of arbitration, so long as there has been no conduct on the part of the union that constitutes a breach of its duty to fairly represent the grievants. *Alfieri v. General Motors, supra; Elrod v. Teamsters*, F2d , 85 LRRM 2189 (9 Cir. 1973); *Harris v. Chemical Leamon Tank Lines*, 437 F2d 167 (5 Cir. 1971).

Applying the above law to the facts in this case can produce only one result—none of plaintiffs' claims was subject to review by the Court below.

In 1960, with Steelworkers' assistance, plaintiffs filed two similar grievances alleging various improprieties in the indirect incentive plans set up by Bethlehem to establish compensation of the indirect mechanical and electrical maintenance employees to the strip mill. In these grievances plaintiffs claimed *inter alia* that they were really "direct" employees, that the "test period" used in setting

up their plan was improper and generally that the rates in the plan were unfair and unreasonable (Cummings Aff. and Exs. thereto, A. 153, 158). Both grievances were processed by Steelworkers through the lower steps of the grievance procedure and, in 1962, arbitration hearings were held on both grievances. At these hearings Steelworkers withdrew from both grievances the issue that the maintenance employees' plan should be classified as "direct", leaving two remaining issues unresolved. As noted above the arbitrator then remanded the grievances. Subsequently the grievances again wended their way through Steps 3 and 4 of the grievance procedure where full discussions were held on the open issues between Steelworkers and Bethlehem representatives. Then, on June 2, 1964 at a meeting of the Joint Incentive Committee (Step 4½), that bipartite body found that the issues pertaining to "test period" and whether the plaintiffs should be categorized as direct rather than indirect workers had been resolved (Theis Aff., A. 227-29). The Joint Incentive Committee concluded therefore that there were no open issues remaining in the grievances based upon Bethlehem's commitment to apply any adjustments in the direct plans to the indirect units along with any retroactive payments which might flow therefrom.

However, despite this recognition at "Step 4½" by a group of company and union representatives skilled in incentive matters that there was nothing left to arbitrate, because of a practice peculiar to industrial relations at Lackawanna, the employees themselves, despite the findings of their International representative, insisted the matter be taken to arbitration (Trost Aff., A. 273). Predictably, the arbitrator, after a hearing, issued an award sustaining the Joint Incentive Committee and dismissing the grievances (A. 374).

It is this seemingly endless effort of the Union, including numerous conferences, meetings and arbitration hearings vigorously processed by the Union over a span of four years that plaintiffs would seek to stamp with the label "unfair". Clearly there is no basis in fact or law for such an accusation. They choose to ignore the fact that the Union was processing hundreds of grievances involving these same issues for many other incentive units and as the Joint Incentive Committee or the Umpire would resolve issues in arbitration these became precedents which were binding on the Union.

The federal courts, charged with the task of developing a uniform federal labor policy, have consistently held that union representatives, in carrying out their responsibilities to the members, must be free to exercise their judgment and discretion in culling and sifting the various issues in grievances as they process them through the grievance procedure. *Vaca* at 194, *Ford Motor v. Huffman*, 345 U.S. 330, 338 (1953); *Bazarte v. United Transportation Union*, 429 F2d 868, 872 (3 Cir. 1971). The sole thread upon which appellants hang their case is the alleged mishandling of the 1964 arbitration hearing by Arthur Jardin, a Steelworker representative, who supposedly failed to call the arbitrator's attention to the exact number of "direct plan" grievances still open and a subsequent statement by Mr. Jardin that he had argued that particular case "with my tongue in my cheek". Such conduct simply does not violate a union's duty of fair representation. Judge Curtin so found below:

> "Whether Jardin's statement about the number of grievances still open was correct or not, it is beside the point because he made that representation during a long oral argument to the umpire about the merits of the grievances. The umpire had all of the prior records before him in making his decision and, in his

> decision of July 12, 1965, the umpire made clear that he was deciding the grievances before him on the record. Furthermore, whether or not one or four units had been previously settled would not in any way affect the decision of the umpire in grievances B-3139 and B-3141. Jardin's remark about proceeding with "my tongue in my cheek" was simply a candid appraisal of the hopelessness of pressing the grievances to arbitration, made by an experienced negotiator." (A. 16-17)

This finding of the District Court is correct on the facts and law.

The Steelworkers' conduct in processing plaintiffs' grievances meets none of the accepted bench-marks of "unfair" union conduct laid down by the federal courts. There is no evidence of arbitrary, discriminatory or bad faith conduct, *Vaca v. Sipes, supra* at 190, no dishonesty of purpose, fraud or misrepresentation, *Balowski v. U.A.W.*, 372 F2d 829, 834 (6 Cir. 1967), and the bulk of the record itself is plain testimony that Steelworkers did not refuse to process a meritorious grievance or process it in a "perfunctory" manner. *Humphrey v. Moore, supra* at 349.

If anything, Steelworkers went beyond the legal norm, going so far as to take a case to a second arbitration hearing when it knew there were no meritorious grounds. (Trost Aff. A. 273-274).

Nor do plaintiffs' allegations about Steelworkers' handling of grievances for employees in two of the direct units raise any triable issues. Steelworkers' decision to drop these grievances was based on judgments made in good faith (A. 227-229, 271-273). Again there is no evidence of the type needed to prove an actionable breach of duty. Even if the plaintiffs' suspicions and unsubstantiated allegations were accepted as fact they would constitute no more than a mistake of judgment. But this is not enough to show a

breach of the Union's duty. *Dente v. Masters, Mates and Pilots,* 492 F2d 12, (9 Cir. 1973); *Berry v. Pacific Intermountain Express,* F.Supp. , 85 LRRM 2408 (D.N.M. 1974).

Moreover, the grievances allegedly mishandled concerned employees working in direct units, *not* these plaintiffs. There is no evidence whatever in the record that the employees in the 54" Tandem Mill or Hot Mill Proper ever complained about the way their grievances were settled or the adjustments in their earnings that flowed therefrom. Indeed there has been no showing that the Steelworkers' actions in these grievances adversely affected plaintiffs at all. Given the complex computations and formulae involved, further processing of the grievances to arbitration might have resulted in a lesser settlement to the direct employees and/or less to plaintiffs. In labor relations as in other areas Unions are sometimes well advised to take the proverbial "bird in the hand".

In any event the plaintiffs are not members of the 54" Tandem Mill or Hot Mill Proper units and have no status to press the charge that the Union was guilty of unfair representation of those units. Further there was no grieving of the revised plans by members of the latter units when they were put into effect in 1961 and at this late date such a grievance would be barred under Article XI of the Collective Bargaining Agreement.

POINT II

Plaintiffs have abandoned the grievance procedure, thereby preventing the Union from performing its duty of representation.

Prior to the institution of this action in June 1966, the plaintiffs' two related grievances had been duly processed through the grievance procedure provided in the Collective Bargaining Agreement. As of that time all of the direct plan grievances had been finally resolved (except for the Picklers) and it was apparent that the settlement of the Picklers would have no impact on the incentive plans of these plaintiffs.(A. 181-182). In May 1966 the Company undertook the computation of the amount of retroactive pay, if any, due the plaintiffs by reason of the adjustment in the plans of the direct units. This was in keeping with the final award handed down by the Impartial Umpire confirming the Company's agreement that "any adjustments which may be made in incentives as components of the incentives involved here will also apply to these incentives" (Final Decision, Grievances B-3139 & B-3141, July 12, 1965, A. 374).

At this point in time the Union had achieved what the plaintiffs had sought from the outset—they had secured plaintiffs' contractual right to share in whatever monetary benefit might flow to them from adjustments in the underlying direct incentive plans. There can be no issue of fact as to a failure of representation by the Union prior to this date. The plaintiffs' rights had not been prejudiced. They had attained all that they were entitled to.

As of May 1966 all that remained to be done was a computation of the amount of retroactive pay (if any) due the plaintiffs—a point admitted by all parties very early in

this litigation. When it was discovered that certain of the production records were lost, Bethlehem came up with the most feasible and practicable alternative method of computation, making a pro rata comparison of the plaintiffs' earnings before and after the final adjustments in the contributing plans on June 10, 1962, (A. 148, 184-186) and the Company submitted this formula to the Union as the basis for payment. (A. 99).

In their Answers to Bethlehem's Interrogatories, plaintiffs acknowledged that the payment was tendered to them on May 31, 1966 when they were assembled at the Union Hall; that the tender of payment was rejected; that the reason for rejection was their feeling that it was inadequate; that the proper payment is a matter of computation by formula, but no alternative formula was countered by plaintiffs. (Plaintiffs' Answers to Interrogatories, 89, 91, 92, 93, 94, 95, 96, 97; A. 99).

Finally, plaintiffs concede that after the rejection of Bethlehem's computation, none of the plaintiffs filed any grievance on that issue:

Bethlehem's Interrogatory 106:

> "106. Did any of the plaintiffs individually file a grievance with the defendant Bethlehem Steel Corporation or its representatives relative to the matter of compensation, as claimed in plaintiffs' complaint, at any time after the offer of compensation, as referred to in interrogatory number 91, was rejected?" (A. 92)

Plaintiffs' Answer:

> "On information and belief, No." (A. 106).

In this manner the individual plaintiffs assembled in the Union Hall on May 31, 1966, relying upon the advice of independent counsel who had been invited to the meeting,

(A. 99) made the decision to abandon the grievance procedure and prevented the Union from performing its duty of representation. A few days later this ill-advised lawsuit was started and the extended litigation has delayed the relief which was then at hand from within the grievance procedure.

Under Article XI of the Collective Bargaining Agreement the plaintiffs are required to pursue their remedies within the grievance procedure and arbitration. Their failure to do so constituted a breach of the Collective Bargaining Agreement. If there is to be a hearing as to whether Bethlehem's computation of the retroactive pay is proper or whether some alternative method of computation should be adopted, the company has the right to have that issue determined within the grievance procedure and in accordance with the precedents which govern all questions pertaining to the incentive system. It would be unfair to the thousands of other employees governed under the Collective Bargaining Agreement if this group had the right to recover more incentive pay than the system provides.

Putting aside the legal rule as to exclusiveness of remedy we submit that this issue cries out for adjudication within the specialized tribunal created to hear employer-employee disputes. Unlike the usual employee grievances involving seniority rights, discipline or discharge, this case involves an extremely complex system of interrelated incentive plans and the impact, if any, on indirect workers resulting from adjustments in the plans of the direct workers. The Williamson affidavit sets forth the variable offsetting factors which have bearing on the computation and demonstrates the folly of trying to resolve such questions before a court and/or jury.

The issue should be determined by specialists who know the intracicies of the incentive system and are mindful of the precedents which have been handed down in arbitration. At the 4½ step grievance level sit experts of the Company and Union, specialists trained in the administration of incentive plans. In event of their failure to resolve the issue, the permanent Impartial Umpire is the final arbiter who brings to the issue years of experience and knowledge of past practice, so that these plaintiffs may receive all that they are entitled to, but at the same time, assure no special treatment which would be unfair to the thousands of other employees covered by similar incentive plans.

We submit that the exclusive remedy of the Collective Bargaining Agreement bars this action and the court should not take jurisdiction in this very sensitive area.

CONCLUSION

The order of the District Court entered January 3, 1974 should be affirmed.

Dated: August 22, 1974

Respectfully submitted,
HODGSON, RUSS, ANDREWS,
WOODS & GOODYEAR,
Attorneys for Defendant-Appellee,
Bethlehem Steel Corporation,
1800 One M & T Plaza,
Buffalo, New York 14203.

JOHN E. DICKINSON,
DAVID E. HALL,
Of Counsel

SERVICE OF TWO COPIES OF THE WITHIN
BRIEF AT BUFFALO, NEW YORK THIS
5 day OF SEPTEMBER, 1974,
IS HEREBY ADMITTED.

William D. Scott

WILLIAM D. SCOTT
Attorney for Plaintiffs-Appellant

SERVICE OF TWO COPIES OF THE WITHIN
BRIEF AT BUFFALO, NEW YORK THIS
6th day OF SEPTEMBER, 1974,
IS HEREBY ADMITTED.

Thomas E. Krug

THOMAS E. KRUG
Attorney for The United
Steelworkers of America,
Defendants-Appellees.